No. 77-1126

In the Supreme Court of the United States

OCTOBER TERM, 1977

FRANK D. STANLEY and THE O/S NATIONAL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. A) is not reported. The prior opinion of the court of appeals in this case (Pet. App. B) is reported at 545 F.2d 661.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1977. A timely petition for re-

hearing was denied on January 11, 1978. The petition for a writ of certiorari was filed on February 10, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, customs agents and a Coast Guard official properly boarded a vessel in customs waters and searched its cargo hold.

STATEMENT

In a four-count indictment returned in the United States District Court for the Northern District of California, petitioner Stanley was charged with importing and possessing with the intent to distribute approximately 10,600 pounds of marijuana and conspiring to commit those offenses, in violation of 21 U.S.C. 952(a), 841(a)(1), 963, and 846. A complaint seeking forfeiture and condemnation of the O/S NATIONAL was filed pursuant to 21 U.S.C. 881 (a)(4) and 49 U.S.C. 782, alleging that the vessel had been unlawfully used for the transportation of the marijuana.

After a pretrial hearing, the district court granted petitioner's motion to suppress the marijuana and other evidence that had been seized in a warrantless search of the O/S NATIONAL and entered a judgment of non-forfeiture of the vessel. On the government's appeal, the court of appeals reversed and remanded the case for trial (Pet. App. B).

On remand, petitioner Stanley waived a jury trial and was convicted as charged. He was sentenced to concurrent terms of four years' imprisonment and three years' special parole.[1] The district court entered a judgment of forfeiture against the vessel. The court of appeals affirmed in a brief memorandum decision relying on its earlier opinion (Pet. App. A).

The evidence showed that early on the morning of February 6, 1976, Sonoma County Deputy Sheriff Herman Carr was summoned to the dock area of the Harbor Fish Company in Bodega, California, where he came upon an immobilized two-ton rental truck (H. 44-45).[2] The driver of the truck, co-defendant Martin Estes, informed Officer Carr that he was awaiting the arrival of a vessel that was to drop off some fishing gear for subsequent delivery to another coastal town (H. 46). The pier manager, who was also present, reported that tire tracks and broken pier planking indicated that the truck had previously backed up to the waterside loading area. Upon being asked, Estes denied that he had backed the truck down the pier to the water's edge (H. 46-47). When Estes left the area to find a jack with which to free the vehicle, Officer Carr noticed marijuana debris

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[1] Mario Gonzales-Garcia and Alan Henry Culbert, alias Martin Estes, were also indicted. The former is a fugitive and the latter was charged in a superseding indictment with importation, conspiracy to import, and conspiracy to distribute marijuana. He was convicted and sentenced to five years' imprisonment, five years' special parole, and a $45,000 fine.

[2] "H." refers to the transcript of the hearing on petitioner Stanley's motion to suppress.

near the end of the truck, inside it, and on the pier's loading zone by the water (H. 48-49). From that evidence, and in light of the size of the truck and the fact that it had broken through the pier, Officer Carr concluded that a substantial quantity of marijuana had been unloaded from the truck (H. 50).[3]

When Officer Carr inquired of local fishermen whether they were aware of any boats not berthed at Bodega Bay or unusual vessels that had departed from the harbor early that morning, he was told that only three boats were known to have left the bay, but that all were familiar vessels with well-known operators (H. 51). A fisherman who lived in a camper near the entrance to the Harbor Fish Company pier related that he had been awakened at about 5:30 a.m. by noise outside his camper and that he saw a rental truck backed onto the pier, a second truck of approximately the same size backed up to the front of the first vehicle, and three or four men milling around the trucks. Hearing what he thought to be the sound of crab pots being loaded onto a truck, the fisherman asked the men what they were doing. In response, two of the men fled toward a nearby highway. The fisherman subsequently telephoned the pier manager to report the incident (H. 51-52).

Another local fisherman and a second deputy sheriff who assisted Officer Carr in his investigation communicated by radio with various boats in the area

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[3] Petitioner stipulated to the officer's ability to recognize marijuana, its residue and seeds (H. 49-50).

to determine whether any unusual vessels had been seen in the harbor that morning. Two replies to the inquiry were received. The GOLDEN CHALICE, a frequent visitor to the area, reported that the only non-local boat it had encountered was the O/S NATIONAL, an old halibut schooner rigged for albacore and tuna fishing, which had sailed out of Bodega Bay early that morning and had then turned northward (H. 52-53, 57, 79-84). A second boat reported that the NATIONAL had been anchored off-shore the previous day for no apparent reason, equipped with gear that indicated the vessel had been fishing in Mexican or Southern California waters (H. 56). Officer Carr then asked local Fish and Game Department officials about seasonal fishing conditions in the area. They confirmed that there was no albacore or tuna fishing in Northern California waters at that time of year (H. 55).

From his investigation, Officer Carr determined that only four boats had left the harbor that morning: the NATIONAL; the GOLDEN CHALICE, which had responded to the radio inquiry and had been seen in the harbor that morning; and two local vessels, one a drag boat and the other a party boat, both of which frequently left the harbor early in the morning (H. 77-79). Recalling that he had not seen the NATIONAL during his routine check of the harbor area at about midnight the previous evening, Officer Carr reasoned that the NATIONAL must have come into the harbor after that time, even though all service facilities for fuel and supplies had already been shut down and

the seas were calm (H. 56-57). From all this information, Officer Carr concluded that the NATIONAL had been involved in the marijuana transfer. He telephoned the Coast Guard to request that the vessel be apprehended (H. 84).

A Coast Guard cutter was dispatched to intercept the vessel (H. 89). The cutter first spotted the NATIONAL at about 2:00 p.m., approximately seven miles from shore (H. 90, 92). As the cutter approached, the NATIONAL appeared to alter its course toward the open sea (H. 90, 95). The cutter changed its course accordingly and eventually pulled alongside. Coast Guard officers on board the cutter noticed that the NATIONAL did not appear to have been recently engaged in fishing, as its rigging and equipment were in a state of disarray and disuse (H. 119-120, 125-126) and certain gear was missing (H. 126). In addition, although the vessel was basically outfitted for tuna and albacore, some of its rigging was of the type associated with salmon fishing (H. 120-123, 138-141).

Two customs agents and a Coast Guard representative boarded the NATIONAL (H. 92, 109). One of the customs agents identified himself and began to search the boat. He opened the cargo hatch in the boat's fantail where he saw what appeared to be several bales of marijuana. Petitioner Stanley and his crewman were then arrested and the vessel seized (H. 109-112, 131-132).

ARGUMENT

1. Petitioners argue (Pet. 6-9) that the search of the NATIONAL by customs agents and Coast Guard officers violated the Fourth Amendment. We submit that the search was legal, whether viewed as a probable cause search or as a border search.

a. Although two members of the court of appeals ruled otherwise, we believe that the search in this case was supported by probable cause. Officer Carr, an experienced law enforcement officer responding to reports of suspicious waterfront activity, came upon an immobilized rental truck that obviously had been hauling a heavy cargo when it backed onto a dockside loading area. He discovered marijuana residue in significant quantities on and within the truck and at the waterside loading zone. Rejecting an unconvincing denial by the vehicle's driver, Carr reasonably surmised that a land-sea transfer of a large quantity of marijuana had recently taken place. His suspicions were reinforced by a local fisherman's report of early morning truck movement and noise in the pier area and the subsequent flight of two individuals involved in the activity when they were confronted by the fisherman.

Carr's investigation provided him with sufficient information to determine that it was the O/S NATIONAL that probably had been involved in the transportation of the marijuana. Only two non-local boats were known to have left the harbor area that morning. One, the GOLDEN CHALICE, responded to a radio

inquiry and had been docked in the bay the previous evening. The other, the O/S NATIONAL, had been anchored offshore the previous day without apparent reason. The NATIONAL was rigged for fish not then in season in Northern California waters; it had entered the harbor sometime after midnight, when services were unavailable and when there was no bad weather from which to seek shelter; and it departed in the early morning hours shortly before a local resident was awakened by noise in the pier area. As the marijuana cargo was no longer in the rental truck, Carr reasonably concluded that it had probably been transferred to the NATIONAL and that the NATIONAL was carrying the contraband to another port.

Further indications of criminal involvement came to light as the Coast Guard cutter approached the NATIONAL. The NATIONAL altered its course toward the open sea when the cutter came within sighting range, possibly as an evasive action. Moreover, its rigging was in disarray and had apparently not been recently used, while certain equipment normally displayed by a fishing vessel was not visible. It was thus evident that although outfitted as a fishing boat, the NATIONAL had not been used for fishing for some time, and it was not at sea for the purpose of fishing on that day.

Taken together, these facts were sufficient to establish probable cause to search the NATIONAL, as Judge Kilkenny concluded below (Pet. App. 11a). Since motorized marine vessels are, if anything, even more

mobile and elusive than automobiles, there is no question that if there was probable cause for the search by customs and Coast Guard personnel, the search was legal. *Carroll* v. *United States*, 267 U.S. 132, 152; *Chambers* v. *Maroney*, 399 U.S. 42, 52.

b. Even if the facts known to the officers at the time of the search did not constitute probable cause but only provided a strong basis for suspicion, the cargo search in customs waters can be sustained as a valid border search. When an individual crosses an international border, he can be searched even in the absence of probable cause, particularly in a case such as this one, where the officers conducting the search are "aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that contraband is being carried across the border." See *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884; cf. *United States* v. *Ramsey*, 431 U.S. 606, 616.

At the time of the search, the NATIONAL was outside the three-mile territorial limit, and thus outside this country's international maritime border,[4] but it

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[4] There is no support for petitioners' suggestion (Pet. 16-17) that the three-mile limit is not the established border for purposes of a customs search at sea. The three-mile territorial limit was established by international custom at the time of this country's independence. That custom provides that the coastal nation possesses plenary jurisdiction within its waters three miles from shore all along its coastline. As this Court has observed, the territory subject to the jurisdiction of the United States includes "the land areas under its dominion and control, the ports, harbors, bays and other enclosed

was still inside the twelve-mile limit of the customs waters,[5] within which customs searches are permitted. 19 U.S.C. 1581(a). As the court of appeals noted (Pet. App. 8a n. 6), there is no doubt that the border was crossed, for the NATIONAL was seen leaving Bodega Bay in the morning and was sighted later some nine miles off the coast. Although the search of the vessel was not undertaken precisely at the point it crossed the invisible three-mile line, the court of appeals correctly observed (Pet. App. 11a) that the customs waters between the three-mile limit and the twelve-mile limit constitute the functional equivalent of the border for the purpose of conducting border searches of vessels, at least where it is reasonably certain that the territorial border has been crossed. *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 273; *United States* v. *Tilton*, 534 F.2d 1363, 1366 (C.A. 9); *United States* v. *Ingham*, 502 F.2d 1287, 1290 (C.A. 5), certiorari denied, 421 U.S. 911; *United States* v. *Glaziou*, 402 F.2d 8, 12 (C.A. 2).

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arms of the sea along its coast, and a marginal belt of the sea extending from a coast line outwards a marine league, or three miles." *Cunard Steamship Co., Ltd.* v. *Mellon*, 262 U.S. 100, 122.

[5] Customs waters are defined in 19 U.S.C. 1401(j) as waters within four leagues (12 nautical miles) of the United States coast. 14 U.S.C. 143, 19 U.S.C. 1401(i) and 1709(b) provide that Coast Guard commissioned officers, warrant officers, and petty officers are deemed to be officers of the customs.

certiorari denied, 393 U.S. 1121; *United States* v. *Hill*, 430 F.2d 129, 131 (C.A. 5).[6]

While the border search exception has traditionally been applied to searches conducted upon entry into this country, rather than upon departure, there is no reason to devise different rules to govern exit border searches. The governmental interest in preventing illicit international drug trafficking and other forms of smuggling is not restricted to controlling incoming contraband. Indeed, the Controlled Substances Act criminalizes exportation as well as importation of illegal drugs. 21 U.S.C. 953. While illicit drug trafficking may more commonly involve importation into rather than exportation from the United States, the opposite is true with respect to other commonly smuggled goods, such as firearms. See *United States* v. *Gonzalez-Rodriguez*, 513 F.2d 928 (C.A. 9); *Samora* v. *United States*, 406 F.2d 1095 (C.A. 5). Moreover, the cooperation of foreign nations in controlling the traffic in illicit drugs is dependent in part on this country's efforts to control the export of drugs and other contraband.[7]

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[6] The obvious impossibility of funneling marine traffic into fixed checkpoints accounts for the judicial deference accorded border searches at sea. The courts have recognized the difference between administering borders through which landlocked vehicles pass and those crossed by international shipping. See, *e.g.*, *United States* v. *Ingham*, *supra*, 502 F.2d at 1290.

[7] The United States has a duty under international law to establish such an inspection scheme, since it is required to "effectively exercise its jurisdiction and control in adminis-

In discussing the border search exception, neither this Court nor any court of appeals has distinguished between incoming and outgoing border traffic. See *California Bankers Association* v. *Schultz*, 416 U.S. 21, 63 ("[T]hose entering and leaving the country may be examined as to their belongings and effects, all without violating the Fourth Amendment"); *Maul* v. *United States*, 274 U.S. 501 (upholding Coast Guard authority to seize a vessel heading away from the United States more than 12 miles from the coast); *Cook* v. *United States*, 288 U.S. 102 (approving the seizure of an outward-bound boat 11½ miles from shore); *United States* v. *Christian*, 505 F.2d 94 (C.A. 5) (interception of vessel heading away from United States upheld after vessel had previously entered territorial waters by crossing the three-mile limit); *Samora* v. *United States*, *supra*, 406 F.2d at 1098 (border search of exiting vehicle upheld).

Nor is there any sound basis for suggesting that an individual's expectation of privacy is greater at departure than at entry. As the court of appeals observed (Pet. App. 10a), it is broadly recognized that a border crossing entails a situation in which the state has particularly important interests that can be protected only by permitting reasonable

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trative, technical and social matters over ships flying its flag." Art. 5, Convention on the High Seas, [1962] 13 U.S.T. 2312, 2315. To ensure reciprocal non-interference with American vessels by foreign states it is necessary to exercise control over them.

searches of those seeking to cross, whether they are entering or exiting the country.[8]

In any event, the border search in this case was not a true "exit" search, since at the time it was apprehended, the NATIONAL was apparently not intending to leave customs waters for any substantial period of time but, as petitioners acknowledge, was intending to re-enter American territorial waters farther up the coast. Because of the virtual impossibility of intercepting and searching the vessel at the moment it re-entered territorial waters on its way into another port, the search in customs waters was a legitimate search at a functional equivalent of the border.[9]

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[8] Petitioners concede (Pet. 16) that there is no direct conflict among the courts of appeals on the question presented by this case. The cases cited by petitioners as being inconsistent with the result reached below are inapplicable here. The cases of *United States* v. *Nunes*, 511 F.2d 871 (C.A. 1); *United States* v. *Marti*, 321 F. Supp. 59 (E.D. N.Y.); and *People* v. *Esposito*, 37 N.Y. 2d 156, 371 N.Y.S. 2d 681, 332 N.E. 2d 863, were not decided on constitutional grounds, but instead involved the construction of statutes not at issue in this case. In *United States* v. *Williams*, 544 F.2d 807 (C.A. 5), also relied upon by petitioners, the court held that the search of a moored houseboat could not be upheld as a customs search because there was no showing that the houseboat had ever passed into international waters or that it was even capable of venturing that far from shore. 544 F.2d at 811.

[9] Petitioners suggest that there is no justification for conducting "border searches" of coastwise traffic that leaves and returns to territorial waters without visiting a foreign port. Beyond the difficulty of determining when a vessel is returning from a foreign port and when it is returning from another

2. Petitioners alternatively invite the Court to construe the customs search statute, 19 U.S.C. 1581 (a), to exempt fishing boats from the statute's coverage. There is no authority, either in the language of the statute or the policies underlying it, for adopting any such limiting construction. The statute authorizes customs officers to search "any vessel" in customs waters. Moreover, 19 U.S.C. 1441, which lists various types of vessels that are exempt from customs clearing requirements, does not in terms exempt any of the listed vessels from the provisions of Section 1581(a).[10] Yet even if petitioners are correct that Section 1441 implicitly limits the scope of Section 1581(a), Section 1441 does not list fishing vessels as among those exempt from entry and clearing customs. Indeed, the courts have long recognized both fishing boats and pleasure craft as among those capable of hauling contraband or cargo subject to duties and thus clearly within the reach of Section 1581 or its statutory predecessors.[11] See, *e.g.*, *United States*

American port, this analysis ignores the common smuggling practice of stationing a mother ship—or, a "hovering vessel" —beyond the twelve-mile limit and shuttling a second boat back and forth from that vessel. See 19 U.S.C. 1581(g).

[10] The regulations of the Customs Service implementing the statutory authority to board, search, and seize do not contemplate any exceptions for certain types of vessels. 19 C.F.R. 162.

[11] Petitioners' contention that fishing vessels should be deemed exempt from the application of Section 1581(a) provides them no comfort in this case for yet another reason: as the Coast Guard and customs agents could tell when they

v. *Tilton*, *supra*; *United States* v. *Solmes*, 527 F.2d 1370 (C.A. 9); *The Atlantic*, 68 F.2d 8 (C.A. 2); *United States* v. *Wischerth*, 68 F.2d 161 (C.A. 2); *United States* v. *Winter*, 509 F.2d 975 (C.A. 5); *United States* v. *1,572 Cases of Assorted Liquors*, 4 F. Supp. 1017 (E.D. N.Y.).

The legislative history of Section 1581(a) does not support petitioners' suggestion that the statute was intended to have a very narrow scope. The authority to enforce maritime and customs laws by boarding vessels, accounting for all cargo, and insuring that proper duties were paid was established by the First Congress. Act of July 31, 1789, Section 24, 1 Stat. 43. Early customs statutes limited the boarding and search authority to vessels "bound to the United States" and apprehended within the twelve-mile limit. Act of August 4, 1790, Sections 31, 64, 1 Stat. 164, 175. Those statutes also incorporated a requirement that any intrusion be predicated upon a reasonable suspicion that customs or other laws of the United States have been breached. Act of July 31, 1789, Sections 24, 36, 1 Stat. 43, 47; Act of August 4, 1790, Section 48, 1 Stat. 170. In 1866, Congress altered this scheme to permit boarding and searching of vessels without knowledge or suspicion of a viola-

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approached the NATIONAL, the NATIONAL was not being used at that time for fishing. Even if fishing boats are exempt from Section 1581(a), certainly vessels that are merely outfitted, in some respects, as fishing boats, cannot enjoy that exemption if they are plainly not being used for fishing at the time.

tion of federal law. Act of July 18, 1866, Section 2, 14 Stat. 178. At the same time, Congress omitted the requirement that the vessels be "bound to the United States." This broader provision was maintained in the Tariff Act of 1922 (Act of September 21, 1922, Section 581, 42 Stat. 979), from which the present wording of Section 1581(a) was taken.[12]

In sum, both the constitutional and statutory authority for governmental action of the kind taken against the O/S NATIONAL is founded upon practical and historical considerations reflecting the difficulties in controlling maritime smuggling. Consistent with the universal understanding that customs laws may be enforced at or near international boundaries, the application of Coast Guard and customs officials' statutory responsibilities in the instant case was correctly held compatible with the Fourth Amendment.

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[12] Even if Section 1581(a) did not provide the statutory authority for the search in this case, the search was authorized by 14 U.S.C. 89(a), which provides the Coast Guard with the authority to conduct searches upon the high seas or in territorial waters "for the prevention, detection, and suppression of violations of laws of the United States." We recognize, of course, that neither statute can authorize searches that violate the Constitution. Yet where the search is constitutionally permissible, as in this case, either Act provides statutory authority for the search.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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